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**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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**FINANCE DOCKET NO. 36004**

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**CANADIAN PACIFIC RAILWAY LIMITED**

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**REPLY OF SIX UNIONS IN OPPOSITION  
TO CPRL'S PETITION FOR EXPEDITED DECLARATORY ORDER**

The Transportation Division of the International Association of Sheet Metal, Air, Rail and Transportation Workers' ("SMART-TD"),<sup>1</sup> the Brotherhood of Locomotive Engineers and Trainmen ("BLET"), the International Brotherhood of Electrical Workers ("IBEW"), the American Train Dispatchers Association ("ATDA"), the National Conference of Firemen & Oilers District, Local 32BJ, SEIU ("NCFO"), and the Transportation Communications Union/IAM ("TCU") respectfully submit the following as their Reply to Canadian Pacific Railway Limited ("CPRL")'s Petition for Expedited Declaratory Order (hereinafter "Petition").

CPRL has petitioned the Board for an advisory opinion, which it labels a "Declaratory Order," regarding what the Board would consider as acceptable parameters for a voting trust and management swap, pursuant to which CPRL would install the Chief Executive Officer ("CEO") of its Canadian Pacific Railroad ("CP") subsidiary and an unspecified number of supporting management personnel in control of Norfolk Southern Railway Company ("NS") as a prelude to its acquiring NS and merging it with CP. CPRL says it needs the Board's advice because NS

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<sup>1</sup> United Transportation Union ("UTU") and the Sheet Metal Workers' International Association ("SMWIA") have merged to become SMART. UTU is now referred to as the Transportation Division of SMART.

officers have created doubt in the minds of NS shareholders as to whether the trust and swap could pass muster on formal review by the Board. The Board should reject this Petition.

As set forth below, and acknowledged by CPRL, its Petition offers no actual specifics of how it would act following the Board's opinion because that would be "premature."<sup>2</sup> Were CPRL to actually seek permission to acquire NS, it would have to do so under the regulations the Board adopted in *Major Consolidation Procedures* in 2001. STB Ex Parte No. 582 (Sub-No. 1) (June 11, 2001). In those regulations, the Board explained that it would "take a much more cautious approach" with regard to voting trusts in proposed major transactions, including formally reviewing whether any such trust would result in unlawful, pre-approval control and whether it would be consistent with the public interest. Absent the filing of a formal merger application, which would trigger such a formal review and which necessarily would lay out the precise terms of any proposed voting trust agreement and management plan, the Board should not entertain a request from this, or any carrier, for an advisory opinion on a hypothetical transaction. CPRL's Petition is both inappropriate and untimely; it should be dismissed.

### **BACKGROUND**

On March 2, 2016, CPRL filed its Petition asking the Board to exercise discretionary authority under 5 U.S.C. § 554(e) and 49 U.S.C. § 721 to issue the following declarations:

- (1) that a structure in which CP holds its current rail carrier subsidiaries in an independent, irrevocable voting trust while it acquires control of NS and seeks STB merger authority could be used to avoid the exercise of unlawful premature common control and

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<sup>2</sup> In its Petition, CPRL states it would be "premature to speculate" which CP managers might transfer to NS, and that it is not seeking ruling on whether the voting trust would be "consistent with the public interest under 49 C.F.R. § 1180.4(b)(4)(iv)," as such would be "premature." Petition at 2, 12. CPRL additionally states that "[t]he precise legal structure of the transaction, including whether CPRL or a new CP-NS holding company will acquire NS, is to be determined." Petition at 2 (emphasis added).

(2) that it would be potentially permissible for the chief executive officer of CP to terminate his position at CP entities in trust and then to take the comparable position at NS pending merger approval.

Petition at 2. It says that this action is necessary stop NS's current management from "discourag[ing] stockholder support for a CPRL-NS meeting to discuss the benefits of a merger."

*Id.* at 1.

CPRL wants the Board to muse on the permissibility of the management swap because it says the swap would "facilitat[e] the full scale adoption and implementation of the highly successful 'precision railroading model'" devised by CP's CEO Hunter Harrison. *Id.* at 8. According to Harrison, NS should be run in accordance with his model whether or not an ultimate merger with CP is approved.<sup>3</sup>

On March 10, 2016, the Board ordered that substantive replies to CPRL's Petition be filed by April 8, 2016 and that CPRL's rebuttal is due by April 13, 2016.

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<sup>3</sup> In a Verified Statement supporting CPRL's Petition, CP CEO Hunter Harrison says:

The model is based on five core principles: improving customer service and asset utilization, controlling costs, increasing safety, and valuing and rewarding employees. It is a scheduled railroading model that focuses relentlessly on how to move each customer's shipment from origin to destination as quickly, efficiently and safely as possible. In bringing precision railroading to each new company, I view my role as not simply to present a plan of how the railroad can be more efficiently and effectively operated, but also to bring about a cultural change among employees at all levels, so that everyone is working to incorporate the core principles into every aspect of the business. To do this, I get personally involved by studying the current railroad operations to identify areas where improvement is needed, by making any needed changes, by instructing how the core principles can and should be adopted throughout the business, and by empowering all employees to suggest ways that we can improve.

Petition, Harrison Stmt at 3. While acknowledging that "this is not the time to demonstrate the public interest benefits that will flow from applying the precision railroading model to a combined CP-NS," Harrison says that "implementing the precision railroading model at NS would both protect and enhance the value of NS during the regulatory review process." *Id.* at 3, 4.

## ARGUMENT

### **A. The Board Should Not Issue the Declaratory Rulings Requested By CPRL.**

Under 5 U.S.C. § 554(e), the Board has discretionary authority to issue a declaratory order to terminate a controversy or remove uncertainty. Indeed, the Board and its predecessor agency have denied such requests in circumstances like this. *See Arvada Transfer Co. —Petition for Declaratory Order*, MC-C-30074, 1988 WL 226030, \*1 (ICC served March 8, 1988) (denying request as premature where it was based on petitioner’s speculation concerning a possible adverse action that might be determined favorably to petition or never ripen into a justiciable dispute). As demonstrated below, CPRL’s request here is similarly premature and based on CPRL’s speculation, and should therefore be denied.

#### **1. A Declaratory Ruling Regarding a Voting Trust Agreement is Not Appropriate at This Time.**

A major transaction is a control or merger involving two or more Class I railroads under 49 U.S.C. § 11323. 49 C.F.R. § 1180.2(a). Post-2001, the regulations set forth formal, detailed procedures that must be followed prior to and along with the proposed filing of an application in a *major* transaction, 49 C.F.R. § 1180.4. There is no dispute that a CP/NS merger would be a major transaction. In its rulemaking, the Board noted that it has “permitted by rule the use of voting trusts during the pendency of control applications, so long as the trust would not result in unlawful control.” STB Ex Parte No. 582 (Sub-No. 1) at 26 (citing 49 C.F.R. § 1013).

Control includes “actual control, legal control, and the power to exercise control, through or by (A) common directors, officers, stockholders, a voting trust, or a holding or investment company, or (B) any other means.” 49 U.S.C. § 10102(3). The STB and its predecessor have frequently described control as “the power to manage the day to day affairs of the entity assertedly controlled.” *See Canadian National Ry.—Control—Ill. Cent. Corp.*, 4 S.T.B. 122

(1999) (citing *Declaratory Order – Control – Rio Grande Indus. Inc.*, FD 31243, slip op. at 3 (ICC served Aug. 25, 1988)). With regard to voting trusts, the regulations state, in pertinent part:

Applicants may also propose the use of a voting trust at this stage, or at a later stage, if that becomes necessary. In each proceeding involving a major transaction, applicants contemplating the use of a voting trust must explain how the trust would insulate them from an unlawful control violation and why their proposed use of the trust, in the context of their impending control application, would be consistent with the public interest.<sup>4</sup> Following a brief period of public comment and replies by applicants, the Board will issue a decision determining whether applicants may establish and use the trust.

49 C.F.R. 1180.4(b)(4)(iv) (emphasis added).

Here, no merger application has been filed, nor has CPRL undertaken any of the pre-filing requirements outlined in 49 C.F.R. § 1180.4(b). Rather, CPRL, in its unprecedented request, asks that the Board utilize its discretionary authority to offer preliminary, assertedly non-binding, guidance addressing what it calls “uncertainty” over the legitimacy of tactics it wants to use to take over NS. Petition at 9. It says that by acting now, the Board will “minimize

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<sup>4</sup> During the Comment period, CP argued that in merger proceedings, the Board should:

“raise the evidentiary bar” relating to the evaluation of public benefits. CP argues that, in past merger proceedings, the applicants’ claimed public benefits have often been supported by little more than self-serving, conclusory rhetoric, and their calculations of the economic value of claimed public benefits have not been subjected to careful scrutiny. Our regulations, CP maintains, should be revised to require future applicants to describe the claimed benefits of their transaction in greater detail, and to support the measurement of those benefits with more extensive data. Only “demonstrable” benefits, CP argues, should be accorded weight when conducting the 49 U.S.C. 11324 balancing test. And, CP adds, we should not credit merger applicants with public benefits arising out of “garden variety” commercial and operating arrangements that are commonly entered into by non-affiliated carriers.

STB Ex Parte No. 582 (Sub-No. 1) at 111. Entertaining CPRL’s Petition for declaratory order here, where it is supported by little more than self-serving, conclusory rhetoric would run counter to the 2001 merger rules and CP’s own arguments in support of revisions to the rules.

regulatory interference in the stockholder vote on CP's resolution." Petition at 2. In fact, what CPRL wants is to maximize the Board's influence on that vote by issuing a preliminary purportedly non-binding ruling. Plainly, CPRL is miffed at the apparent success of NS management's representations to its shareholders and needs the Board to inject itself into the controversy because its own lawyers' opinions regarding what the Board will do when a proper application is filed have been unable to carry the day so far in the parrying for favor amongst those shareholders. There is no precedent that this is a valid reason for the Board to issue a declaration. CPRL's request also is flawed because it requires the Board to "assume that a proposed structure" for the voting trust would satisfy the independence and irrevocability requirements of 9 C.F.R. § 1013.1<sup>5</sup> and 1013.2,"<sup>6</sup> and then advise CPRL whether a "potentially

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<sup>5</sup> With regard to the independence of the voting trust trustee, the applicable regulation states:

- (a) In order to avoid an unlawful control violation, the independent voting trust should be established before a controlling block of voting securities is purchased.
- (b) In voting the trustee stock, the trustee should maintain complete independence from the creator of the trust (the settlor).
- (c) Neither the trustee, the settlor, nor their respective affiliates should have any officers or board members in common or direct business arrangements, other than the voting trust, that could be construed as creating an indicium of control by the settlor over the trustee.
- (d) The trustee should not use the voting power of the trust in any way which would create any dependence or intercorporate relationship between the settlor and the carrier whose corporate securities constitute the corpus of the trust.
- (e) The trustee should be entitled to receive cash dividends declared and paid upon the trustee stock and turn them over to the settlor. Dividends other than cash should be received and held by the trustee upon the same terms and conditions as the stock which constitutes the corpus of the trust.
- (f) If the trustee becomes disqualified because of a violation of the trust agreement or if the trustee resigns, the settlor should appoint a successor trustee within 15 days.

49 C.F.R. § 1013.1.

<sup>6</sup> With regard to the irrevocability of the voting trust, the applicable regulation states:

permissible way to avoid [an] unlawful control” violation is for CPRL to hold the voting securities of its own carrier subsidiaries in a voting trust before acquiring formal ownership and control of NS and before seeking the Board’s approval of a merger of CP and NS.

The Board simply cannot assume that CPRL will fulfill the independence and irrevocability requirements. Indeed, such an assumption would run afoul of the purpose of the revisions to the merger rules. In essence, it appears CPRL *may* propose a voting trust pending approval of the merger under which the acquiring railroad (CP) would be placed in trust, rather than the to-be-acquired railroad (NS), and CP’s CEO Hunter Harrison and other executives of the acquiring railroad (CP) would become the executives of the to-be-acquired railroad (NS) while other CP executives and management personnel would remain at CP. Petition at 2, n.3. Notably, CP is not asking for Board to rule on the actual voting trust agreement because it does not yet exist. Nonetheless, CPRL asks the Board to opine on its hypothetical and highly speculative voting trust situation.<sup>7</sup> Although there have been no Board rulings on a voting trust

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- (a) The trust and the nomination of the trustee during the term of the trust should be irrevocable.
  - (b) The trust should remain in effect until certain events, specified in the trust, occur. For example, the trust might remain in effect until (1) all the deposited stock is sold to a person not affiliated with the settlor or (2) the trustee receives a Board decision authorizing the settlor to acquire control of the carrier or authorizing the release of the securities for any reason.
  - (c) The settlor should not be able to control the events terminating the trust except by filing with this Board an application to control the carrier whose stock is held in trust.
  - (d) The trust agreement should contain provisions to ensure that no violations of 49 U.S.C. 11343 will result from termination of the trust.

49 C.F.R. § 1013.2.

<sup>7</sup> In its initial reply, CSXT argues that the Board should decline to exercise its discretionary authority where, as here, the petition is based on a hypothetical and incomplete voting trust and CP’s unilateral “urgent” deadline. (CSXT Reply at 1 (quotations in original)). CSXT further stated that CP’s petition “circumvents the very procedure the Board established [in 2001] for voting trusts,” that the “Board should not rule on proposed voting trusts in a piecemeal fashion,

application under the new merger procedures, much of the uncertainty here is due to CPRL's inability and/or unwillingness to comply with the established merger requirements set forth in the regulations.

While the Board has discretionary authority to issue a declaratory order under 5 U.S.C. § 554(e), it has equally broad discretion to deny such requests. In *Arvada Transfer Co.*, *supra*, the ICC denied a similar request because "the need for the determination petitioner requests at this time is premature, as it is based on petitioner's speculation concerning a possible adverse action by" a state public utility commission. 1988 WL 226030 at \*1. Here, CPRL alludes to a possible adverse action at a targeted company's shareholders' meeting as the rationale for its Petition. Petition at 2, 5, 9-11. Certainly, this is an even less convincing reason for Board action.

Furthermore, there can be little doubt based on the limited information provided by CPRL that CPRL's proposed voting trust and management plan would result in unlawful control. Accordingly, the Board should not consider the Petition.

## **2. A Declaratory Ruling Regarding a Management Swap is Not Appropriate at This Time.**

If allowed to do so, CPRL will have CP executives – including CP's CEO – transfer to NS while others would remain at CP and CPRL, though it says that it would be "premature to speculate as to whether and who might transfer." Petition at 2, n.3. In its December 16, 2015, conference call transcript, CPRL CEO and Director Bill Ackman stated that CP will be held in trust, with current CP President and Chief Operating Officer Keith Creel running CP, and NS being controlled by the Board of CPNS with Hunter Harrison as the CEO. *Transcript: CP*

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applying certain tests required by the regulations, but ignoring or "assuming" away others; and that "issuing a declaratory order would set a dangerous precedent by signaling the Board's willingness to adjudicate hypotheticals outside the framework established by the 2001 regulations." *Id.* at 1-3. We agree.

*Addresses Investors* (Dec. 16, 2015), at 5, available at <http://www.cpr.ca/en/investors-site/Documents/CP-Conference-Call-Transcript-12-15-2015.pdf> (hereinafter “Dec. 16 Tr.”).

During that same call, CPRL CEO and Director Ackman stated “CP is paying .... for the right to take control of the NS railroad and put Hunter [Harrison] in as CEO.” *Id.* at 4-5. The Board has always required sufficient detail properly articulated in a voting trust agreement and management plan before determining whether a proponent’s plan will violate the proscriptions against premature unlawful control. CPRL has offered little to satisfy that requirement.

When determining whether control exists in the context of an intercorporate relationship, the Board focuses on “the power or authority to manage, direct, superintend, restrict, regulate, govern, administer, or oversee.” *SPCSL Corp.–Petition for Declaratory Order–Control of Gateway Western Ry.*, FD 32282, 32292 (STB served May 17, 1993) (citing *Maine Central R. Co. v. Amoskeag Co.*, 360 I.C.C. 147, 154 (1979); and *Colletti–Control–Comet Freight Lines*, 38 M.C.C. 95, 97 (1942)). Indeed, the agency has long held that control includes the power to select the management team for a rail carrier. *See e.g., Louisville & Jeffersonville Bridge & R.R. Merger, etc.*, 295 I.C.C. 11, 16 (1955), *aff’d sub nom. Alleghany Com. v. Breswick & Co.*, 353 U.S. 151, 163 (1957) (noting that the power to “organize and elect” officers of a rail carrier “constitutes control”). Based on the limited information provided by CPRL, there is no doubt that what it would achieve under its proposal constitutes control.

CPRL says that its proposed voting trust will “enhance[e] the likelihood that NS will be a stronger railroad at the end of the approval process thereby reducing the risk of harm should the transaction be rejected and divestiture ordered, as well as by enhancing the prospects for a smoother integration if the merger is approved.” *Petition* at 8-9. CP’s CEO is not shy in expressing the belief that under his “precision railroading model,” which he would institute on

NS *before* the Board grants approval of a merger, CP's subsidiaries have better working rules that he believes enable them to operate more efficiently than NS.

In "CP Addresses Investors December 16, 2015," CPRL said that approval of the voting trust with its management swap would achieve \$1.11 billion in combined savings from locomotive, train, and workforce productivity pre-merger approval, \$550 million of which would come from the workforce alone. Dec. 16 Tr., *supra*, at 6. CPRL has not revealed how much would come from job abolishments<sup>8</sup> and labor contract rules changes, but one can easily surmise from the application of Mr. Harrison's model on CP that it would have to be very significant.<sup>9</sup> None of these things could be achieved without Harrison's exercising actual control.

Acknowledging these concerns (Petition at 18),<sup>10</sup> CPRL asserts that all will be fine because Harrison will resign from CP in connection with the voting trust. In arguing that a

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<sup>8</sup> CP recently announced that it planned to cut an additional 1,000 positions this year on its existing properties, on top of 6-7,000 others it has eliminated since 2012. See "CP Rail to Cut 1,000 Jobs After Posting Record Profits," *Toronto Sun*, January 21, 2016, *available at* <http://www.torontosun.com/2016/01/21/cp-railway-to-cut-1000-jobs-after-posting-record-profits>.

<sup>9</sup> Of course, changes in working rules can only be accomplished via the collective bargaining processes of the RLA. NS is part of a national coalition of all of the Class I railroads that is currently engaged in bargaining with the unions for changes to existing agreements, a process the Supreme Court has described as "almost interminable" *Detroit & Toledo Shore Line R.R. v. United Transp. Union*, 396 U.S. 142, 149 (1969), whose "procedures are purposely long and drawn out, based on the hope that reason and practical consideration will provide in time an agreement that resolves the dispute." *Railway Clerks v. Florida E. C. R. Co.*, 384 U.S. 238, 246 (1966). CPRL's subsidiaries – Soo Line Railroad Company (a Class I carrier), Delaware and Hudson Railroad Company, and Dakota, Minnesota and Eastern Railroad Corporation – are not part of this national bargaining. They bargain separately from the other carriers and individually with each union. While the imposition of a voting trust on CPRL's rail subsidiaries will likely not affect existing labor relations on CPRL's properties, the companion management swap that CPRL proposes likely would have a dramatic impact on ongoing national industry bargaining, as CPRL plainly has different objectives from NS, if not from all of the other carriers at the national bargaining table.

<sup>10</sup> Notably, in the December 16, 2015, conference call transcript, both CPRL CEO Ackman and CP CEO Harrison state that Hunter has no intention to violate the law against unlawful control, as such would jeopardize the transaction and his integrity, which he "honor[s] greatly." Dec. 16

declaratory ruling should be entertained with regard to CPRL's plan for CP's current CEO to resign his position with CP to become the CEO of NS, CP contends that the Board has permitted other management switches in past transactions (Petition at 17) (citing the SF-SP and CN-IC merger). But what CPRL says is not the case in fact. When asked for comment by the United States House of Representatives' Committee on the Judiciary and Subcommittee on Regulatory Reform, Commercial and Antitrust Law, the Board emphasized that it "has not approved that particular arrangement in the context of a proposed merger between two Class I railroads." STB response to House Judiciary Committee, Major Rail Mergers and Consolidations Correspondence at 1 (Jan. 7, 2016) (hereinafter "STB Congr. Ltr"). Further, in its letter to Congress, the Board examined the three proposed major transactions that have tangentially involved proposed management swaps, two of which CPRL relies upon here. The Board explained that in the proposed 1983 SP-ATSF merger, "although the ICC approved th[e] voting trust [under which the carriers' holding companies were placed under a consolidated entity and four SP officers departed to become employed by the consolidated entity,] it expressed 'deep reservations' and imposed numerous conditions upon its approval." *Id.* at 2 (citing *Santa Fe Southern Pacific Corp.—Control—Southern Pacific Transp. Co.: Merger—The Atchison, Topeka*

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Tr., *supra*, at 15-16. However, when asked during that same call whether CPRL planned on seeking a declaratory order from the STB to confirm that the voting trust structure, Harrison responded:

No, no. ... Look, we are not asking for any special treatment. There is a process in the law that says here is what you do. And the first thing that would happen if we went to look for a declaratory judgment here, they would say you are getting special treatment. Nobody else has ever applied for this. We are willing to submit our application and play by the rules, and whatever they say we will deal with. That is fine. That is just grasping when they don't have anything else to grasp for.

*Id.* at 20. And yet, this is precisely what CPRL is seeking here.

*& Santa Fe Rwy. Co. and Southern Pacific Transp. Co.*, 2 I.C.C.2d 709, 715 (1986); *Santa Fe Southern Pacific Corp.—Control—Southern Pacific Transp. Co.: Merger—The Atchison, Topeka & Santa Fe Rwy. Co. and Southern Pacific Transp. Co.*, FD 30400, 1983 ICC Lexis 70, at \* 1-2, \* 14-17 (ICC served Dec. 23, 1983)).<sup>11</sup>

The Board went on to point out that the ICC raised numerous questions about the proposed voting trust and management plan in the 1994 proposed merger between Illinois Central Railroad (“IC”) and Kansas City Southern Railway (“KCS”). There the parties proposed that the acquiring railroad’s officers would become officers of the to-be acquired company while the transaction was pending. While the ICC initially took the then-unusual step of initiating a formal review process and seeking public comments, the agency never ruled on those proposed arrangements because the parties terminated the transaction during the review process. *See* STB Congr. Ltr, *supra*, at 3 (citing *Illinois Central Corp.—Common Control—Illinois Central R.R. Co. and the Kansas City Southern Rwy. Co.*, FD 32556, 1994 ICC LEXIS 195, at \*1-2, \*4, \*11-18 (ICC served Oct. 19, 1994)).

Lastly, in the proposed merger between the Canadian National Railway (“CN”) and IC, then-CEO of IC Hunter Harrison left his position of the to-be-acquired railroad, to become Chief Operating Officer (“COO”) of the acquiring railroad, CN. Contrary to CPRL’s representations here, as the Board explicitly stated in its January 7, 2016, letter to Congress, “neither the Board’s staff opinion on the voting trust, nor the agency’s subsequent decision approving the merger addressed any proposed management shift.” STB Congr. Ltr, *supra*, at 3 (citing *Canadian Nat. Rwy. Co, et al.—Control—Illinois Central Corp., et al.*, FD 33556, 1998 WL 477655 (STB

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<sup>11</sup> Ultimately, the ICC denied the request for merger approval and directed that the consolidated entity divest either SP or ATSF. STB Congr. Ltr, *supra*, at 2.

served Aug. 14, 1998); *see also Canadian Nat'l Ry Co, et al.—Control—Illinois Central Corp., et al.*, FD 33556, Opinion Letter from Secretary Vernon A. Williams to Paul A. Cunningham (Feb. 25, 1998)). In fact, in Finance Dkt. 33556, Decision No. 6, the Board stated, in pertinent part:

The Board shares UTU's concerns that there not be management or operations in common between railroad entities absent our approval of the common management or operations. Here, however, the applicants have satisfactorily addressed the matters raised by UTU and the factors described do not demonstrate unlawful control. Nor does the structure of the proposed arrangement reflect unauthorized common control of two or more carriers. As previously mentioned, by letter dated February 25, 1998, the Board's staff issued an informal opinion concerning a Voting Trust Agreement (VTA) proposed to be entered into by and between CNR, Merger Sub, and a Trustee, and found that the VTA provided for the placement, into an independent and irrevocable voting trust, of all of the common stock of IC Corp. acquired by CN or by any of its affiliates. In the staff opinion, it was found that the voting trust to be established under the VTA will effectively insulate CN and its affiliates from the violation of Subtitle IV of Title 49 of the United States Code and the policy of the Board that would result if CN were to acquire, without authorization, a sufficient interest in the carrier subsidiaries of IC Corp. as otherwise to result in control; and that, under the VTA, control of IC Corp. and its carrier subsidiaries can be exercised by CN and its subsidiaries only subsequent to approval by the Board of the CN/IC control application. We agree with the staff opinion and find that applicants' VTA conforms to Board regulations as well as long-standing Board and Interstate Commerce Commission precedent recognizing that beneficial ownership can be separated from control by an appropriate voting trust instrument.

*Canadian Nat. Rwy. Co, et al.—Control—Illinois Central Corp., et al.*, FD 33556, 1998 WL 477655 (STB served Aug. 14, 1998). In contrast, here CPRL has provided no voting trust agreement and/or management plan in order for the Board to consider as part of an evaluation whether CPRL's proposal would constitute unlawful control. Indeed, issuing declaratory relief when so much is unsettled would only lead to further confusion and conjecture. Therefore, the Board should decline to weigh in on or issue any declaration regarding CPRL's proposed corporate maneuverings in advance of the filing of a formal merger application.

## CONCLUSION

Providing advisory opinions is not the proper function of the STB. Were it otherwise, carriers and other corporate entities seeking to acquire them could inundate the Board with requests regarding their intended transactions. The Board simply is not equipped to open that door. The Board's proper role is to address actual controversies arising out of actual facts, not conjectured, potential situations.

CPRL is not embarrassed to tell the Board that the only reason it submitted its Petition is to have answers to questions that may come up at an NS shareholders meeting. But the Board should not inject itself into what are plainly controversial commercial decisions facing NS and its shareholders. CPRL wants an advantage it can use to override the disdain expressed by NS executives over a potential CP takeover. CPRL apparently believes that it cannot convince NS management regarding the legitimacy of its plans so that they jointly can be presented to this Board for approval in the ordinary course. This is the sole reason it wants the Board to issue an Order accepting its view of the landscape. There is no satisfactory justification for the Board to accept such an invitation to venture into the domain of shareholder politics. Furthermore, the changes that CPRL proposes to initiate pre-merger as part of the management swap – the so-called “precision railroading model” – not only would constitute unlawful control of NS, they also would plainly destabilize the current labor-management relationships on that carrier.

Based on the foregoing, SMART-TD, BLET, IBEW, ATDA, NCFO, and TCU/IAM respectfully request that the Board dismiss CPRL's Petition and decline to grant CPRL the declaratory order it seeks.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

This is to certify that a copy of the foregoing Reply has been e-filed with the Surface Transportation Board and has been emailed and/or mailed via first-class, postage prepaid mail upon all parties of record.

/s/ Erika A. Diehl-Gibbons  
Erika A. Diehl-Gibbons